

LEGISLATIVE UPDATE

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DEPARTMENT OF PUBLIC ADVOCACY

PUBLIC DEFENDER CASELOADS UP BY 5.8% IN FY07

By Ernie Lewis, Public Advocate

Kentucky public defenders carried an increasing number of cases in FY07. In the *Realizing Justice: Defender Caseload Report Fiscal Year 2007*, released in September, the Department of Public Advocacy (DPA) announced that overall caseloads went up to 148,518 in FY07, up from 140,335 in FY06. This represents the historical high of cases handled in a single year.

Caseload Reduction Frustrated

The primary policy goal after the completion of the full-time system over the past decade for the DPA has been to lower caseloads for individual defenders. Numerous reports have decried the excessive caseloads carried by Kentucky's public defenders. In 1997, Bob Spangenberg wrote for the ABA Bar Information Project that "overshadowing all of the problems facing and the solutions proposed by DPA is that of burgeoning caseloads. Over the past decade DPA's caseloads have increased dramatically, while funding has failed to keep pace."

Two years later, the *Blue Ribbon Group on Improving Indigent Defense for the 21st Century* issued its report. The *Blue Ribbon Group* was a 22 member group of Kentuckians including Mike Bowling and Robert F. Stephens as Co-Chairs, Chief Justice Lambert, former Congressman Scotty Baesler, President of the KBA Richard H.C. Clay, present Court of Appeals Judge Denise Clayton, Commonwealth's Attorney Phillip Patton, the President of the Senate Larry Saunders, the Chair of the Appropriations and Revenue Committee in the House Harry Moberly, Senator David Williams, Rep. Jeff Hoover, Rep. Kathy Stein, and other outstanding citizens. They found that public defender caseloads "far exceed national caseload standards." They recommended that "full-time staff should be increased to bring caseloads per attorney closer to the national standards. The figure should be no more than 350 in rural areas and 450 in urban areas." To accomplish this and other goals, the *Blue Ribbon Group* recommended that DPA's budget be increased by \$11.7 million.

When caseloads did not come down but continued to go up, the Public Advocacy Commission conducted a year-long study and issued a report in September 2005 entitled *Justice Jeopardized Final Report*. This report recommended that "caseloads for trial attorneys should never be above 400 new mixed cases per lawyer per year."

The Commission also recommended that the Commonwealth fully fund the Kentucky public defender system. "At a minimum, an additional \$10 million per year is necessary to bring Kentucky into the mid-level area in comparison with other programs in important benchmark areas such as cost-per-case."

Despite these reports, DPA did not receive \$11.7 million in 2000, nor did it receive \$10 million in 2006. Instead, DPA received \$5.7 million in 2000, and \$3 million in 2006. While new positions were funded that were devoted to reducing caseloads, the reality is that caseloads continued to go up faster than the funding that was dedicated to lowering them.

Caseloads Have Gone Up 8% Each Year Since 2000

The chart below tells this entire story graphically. In 2000, the year following the *Blue Ribbon Group Report*, total

Continued on page 2

INSIDE

- ◆ KY Caseloads Exceed National by 40% 3
- ◆ Urban Defenders Handling 500 Cases Each 4
- ◆ Excessive Caseloads May Be Unethical 5
- ◆ Overwhelmed: Caseloads Limiting Access to Justice 7
- ◆ Heavy Caseloads, *The State-Journal* 8



Ernie Lewis, Public Advocate

Continued from page 1

caseloads were at 97,818. At the time, the average number of new cases opened per trial attorney was 410, down from 475 in FY99. In each successive year, caseloads have gone up. Caseloads took a big jump in FY 04, to 131,094, up 12% from the previous year. At that time, per attorney caseloads were at 489, up from 484 in FY03. Since 2004, caseloads continued to increase. From FY06 to FY07, caseloads increased 5.8%. In FY07, per attorney caseload was down to 436. Overall, caseloads have averaged an 8% increase since 2000.

As a result of these increasing caseloads, per attorney caseloads have remained high. Despite repeated reports and funding requests, DPA per attorney caseloads were at 436 in FY07, 6% higher than they were in 2000.

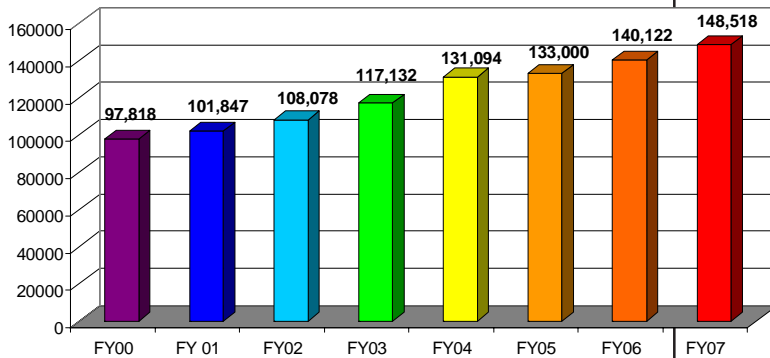
Public Defender Caseloads Have Increased Similarly to the Prison Population

A population driven service is one over which an organization has no internal control. An example of an agency that delivers a population driven service is the Department of Corrections. Their prison population is imposed on DOC by sentencing judges when probation is denied and an inmate is sent to prison. As a result, it is imperative that the General Assembly provide funds to pay for these inmates.

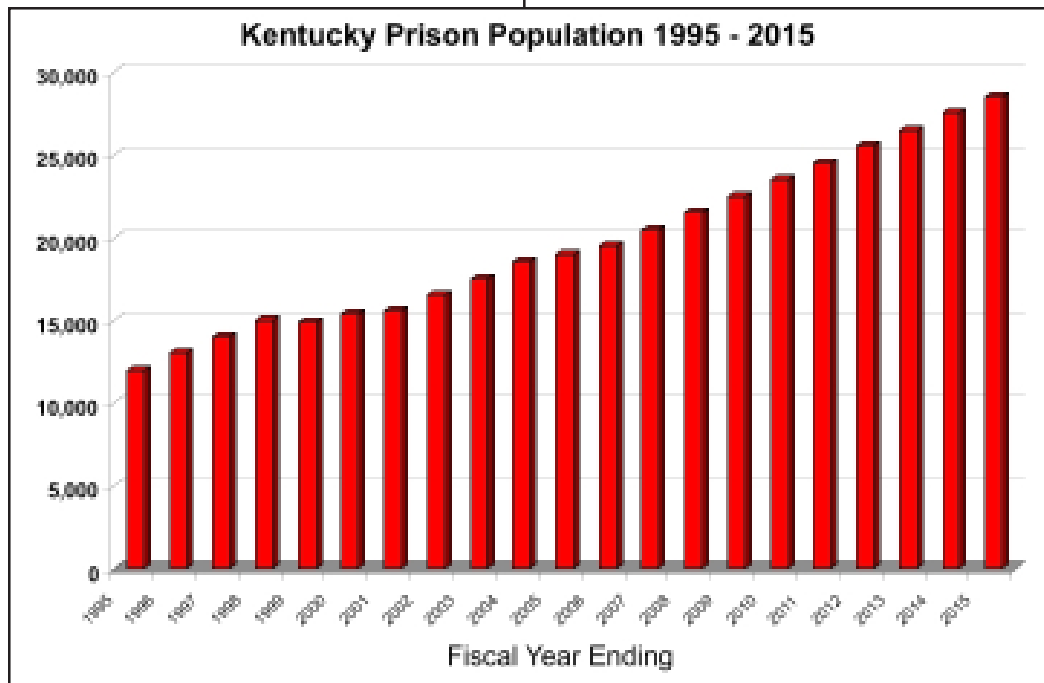
In many ways, DPA is similar to DOC. DPA has no control over its caseload. Kentucky has given DPA the constitutional duty to provide counsel to indigents accused of crimes. Judges appoint persons to be represented. DPA cannot refuse judicial appointments. As a result, this 8% increase is outside of DPA's control. The General Assembly should recognize that like the Department of Corrections, DPA provides a population driven service and should be funded accordingly.

It should come as no surprise that the chart above demonstrating public defender caseloads shows a similar trend to the chart below demonstrating past and projected inmate populations. After all, most of the men and women going to prison had a public defender. ■

Total DPA Caseload



Kentucky Prison Population 1995 - 2015



PUBLIC DEFENDER CASELOADS EXCEED NATIONAL STANDARDS BY AT LEAST 40%

By Ernie Lewis, Public Advocate

The National Advisory Commission on Criminal Justice Standards and Goals (NAC) in 1973 recommended in Standard 13.12 “Workload of Public Defenders” the following:

“The caseload of a public defender office should not exceed the following:

- felonies per attorney per year: not more than 150
- misdemeanors (excluding traffic) per attorney per year: not more than 400;
- juvenile court [delinquency] cases per attorney per year: not more than 200;
- Mental Health Act cases per attorney per year: not more than 200; and
- Appeals per attorney per year: not more than 25

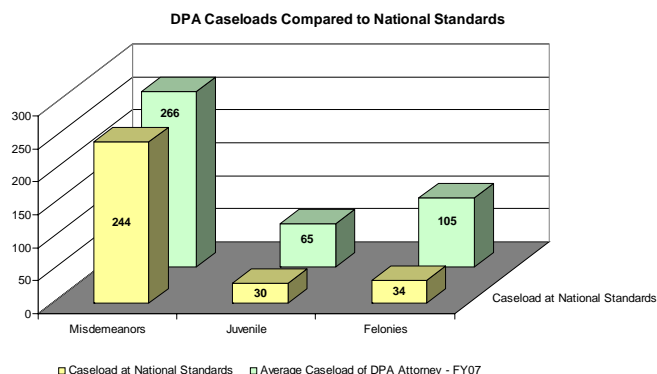
For purposes of this standard, the term case means a single charge or set of charges concerning a defendant (or other client) in one court in one proceeding. An appeal or other action for post judgment review is a separate case.”

In 2002, the American Bar Association approved the *Ten Principles of a Public Defense Delivery System*. Principle #5 requires that “defense counsel’s workload is controlled to permit the rendering of quality representation.” In the commentary to Principle #5, it states that “National caseload standards should in no event be exceeded, but the concept of workload (*i.e.*, caseload adjusted by factors such as case complexity, support services, and an attorney’s nonrepresentational duties) is a more accurate measurement.”

On August 24, 2007, the American Council of Chief Defenders issued a *Statement on Caseloads and Workloads*. This statement includes a resolution that reaffirms the NAC caseload standards, saying that these “caseload limits reflect the maximum caseloads for full-time defense attorneys, practicing with adequate support staff, who are providing representation in cases of average complexity in each case type specified. If a defender or assigned counsel is carrying a mixed caseload which includes cases from more than one category of cases, these standards should be applied proportionally... Each state that has the death penalty should develop caseload standards for capital cases. The workload of attorneys representing defendants in death penalty cases must be maintained at levels that enable counsel to provide high quality representation in accordance with existing law and evolving legal standards.”

Kentucky public defenders mostly carry mixed caseloads. That is, because 26 of DPA’s 30 offices are primarily rural in nature, the attorneys must represent felonies, misdemeanors, and juvenile cases. More specialization occurs in the four urban offices in Louisville, Lexington, Covington, and Boone County.

Kentucky public defenders carry mixed caseloads consisting of 436 new open cases per year. 23% of the caseload occurs in circuit court, 15% in juvenile court, and 61% in district court. 1% of the caseload occurs in family court. Evaluating this mixed caseload for consistency with the NAC standards is somewhat complex. However, based upon the percentages above, Kentucky public defenders compared to the national standards can be understood by the chart below:



A Kentucky public defender carrying a trial caseload consistent with the NAC standards would carry no more than mixture of 34 felonies, 30 juveniles, and 244 misdemeanor cases, totaling 310 cases. At 436 cases, Kentucky public defenders carry caseloads that exceed the national caseload standards by 40%.

It is important to note that Kentucky public defenders carried 436 new cases **only at full staffing**. Full staffing did not occur in FY07 due to an inadequately funded budget. DPA began FY07 \$1.3 million in the red. As a result, 36 new lawyers were not hired until October, and by February 2007 a hiring freeze was implemented. By the end of the fiscal year, DPA was carrying 60 vacancies, including 30 trial attorneys. Thus, the 436 figure is optimistic.

Excessive public defender caseloads have a significant impact. They overload the individual lawyer, leading to burnout and rapid turnover. They may depress the holding

Continued on page 4

Continued from page 3

of jury trials, as lawyers feel the pressure to process cases. Outside Louisville and Lexington, data shows there were only 236 jury trials in circuit court out of some 33,316 cases, or less than 1% of cases. Further, as stated in the *ACCD Statement on Caseloads* “[e]xcessive public defender caseloads and workloads threaten the ability of even the most dedicated lawyers to provide effective representation to their clients. This can mean that innocent people are wrongfully convicted, or that persons who are not dangerous and who need treatment, languish in prison at great cost to society. It can also lead to the public’s loss of confidence in the ability of our courts to provide equal justice.” ■

URBAN DEFENDERS HANDLING 500 CASES EACH

By Ernie Lewis, Public Advocate

Excessive caseloads hit the urban areas of Kentucky particularly hard. For purposes of this article, 4 offices are deemed to be primarily urban: Louisville, Lexington, Covington, and Boone County. In all of them, public defenders carried caseloads either at or above 500 cases per lawyer. 500 cases far exceeds both the NAC standards and the goal set by the *Blue Ribbon Group* of no more than 450 cases per lawyer. The *Blue Ribbon Group* set the goal for rural offices at no more than 350 cases per lawyer.

Louisville

The Louisville Metro Office opened 604 cases per lawyer in FY06 when they had 53 lawyers. As a result, 9 of the 36 attorneys funded by the 2006 General Assembly went to Louisville. Thereafter, in FY07 Louisville Metro Public Defender’s carried 539 cases per lawyer, despite the increase in overall cases of 4.3% from 32,049 in FY06 to 33,446 in FY07.

Lexington

The Lexington Office was staffed at 18 lawyers in FY06 when they reported 7,968 cases. This translated into 442 cases per lawyer. In FY07, as a result of funding problems, the office had only 16 lawyers handling 10,423 cases. Thus, Lexington public defenders carried 651 cases per lawyer, the highest in DPA. This occurred not because of a spike in caseloads but primarily because DPA discovered that Lexington failed to count several thousand cases in FY07, and because Fayette County Legal Aid Inc. did not have the resources to fill several vacant attorney positions.

Covington

The Covington Office consists of two of the three urban counties of Northern Kentucky, Kenton and Campbell. This office has shown a consistent increase over the past several years. In FY05, when the office had 12 lawyers, it opened 6341 cases, or 507 per lawyer. This increased in FY06, when the office had 13 lawyers, to 6723 cases, or 493 per lawyer. In FY07, the office staffing increased to 15 lawyers, and the office caseload increased by 15% to 7,770 cases, or 497 cases per lawyer.

Boone County

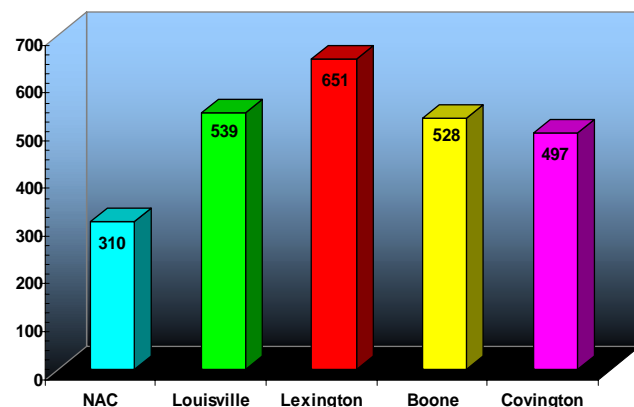
The office in Boone County handles Boone, Gallatin, Carroll, Grant, and Owen Counties. It is included as an urban county despite covering 4 rural counties, with significant travel required. This is because 64% of the caseload originates from the suburban Boone County, which resembles the other three urban offices in many ways.

The Boone County Office more than any other DPA office demonstrates how difficult it has been to reduce caseloads during a time of increasing overall cases. In FY03, prior to the opening of the DPA Office, Boone County reported only 451 cases. In FY 05, Boone County opened 2505 cases. In FY06, this increased to 2910. Finally, in FY07, Boone County opened 3546 cases. Boone County is the fastest growing county in Kentucky, and has also had the most explosive caseload growth as well.

As a result of the growth in public defender caseloads in Boone County itself, caseloads per defender have remained high. In FY05, when the office was staffed with 7 lawyers, the caseload was at 568 per lawyer. In FY06, when the staffing increased to 8 lawyers, the caseload per lawyer was at 563. In FY07, when caseloads went up by 16% and staffing to 10 lawyers, caseloads per lawyer dropped only to 528.

The below chart demonstrates the four urban offices compared to the National Advisory Commission Standards (NAC) adapted to the Kentucky situation. ■

Department of Public Advocacy Urban Offices



AMERICAN BAR ASSOCIATION STATES THAT EXCESSIVE PUBLIC DEFENDER CASELOADS MAY BE UNETHICAL

By Ernie Lewis, Public Advocate

What happens when public defender caseloads are excessive? What is an excessive caseload? Whose responsibility is it to determine whether caseloads are excessive? What happens if the funding is not available to reduce caseloads? These and other questions have been addressed definitively by the top lawyers' organization in the country in a formal ethics opinion.

The opinion is ABA Formal Opinion 06-441, issued on May 13, 2006. It was issued by the American Bar Association Standing Committee on Ethics and Professional Responsibility. The opinion restates what every lawyer and every judge knows to be true and applies it to the context of the public defender's world. "All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation." The focus is on the individual lawyer and on the person or persons who are in policy positions above the individual lawyer.

Responsibility of the Individual Lawyer

Where an individual lawyer cannot provide competent representation to her clients, this opinion requires her to do something about it. "If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients...Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. If the court denies the lawyer's motion to withdraw, and any available means of appealing such ruling is unsuccessful, the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to competently and diligently represent the defendant."

What are the obligations of the individual public defender? "These obligations include, but are not limited to, the responsibilities to keep abreast of changes in the law; adequately investigate, analyze and prepare cases; act promptly on behalf of clients; communicate effectively on behalf of and with clients; control workload so each matter can be handled competently; and, if the lawyer is not experienced with or knowledgeable about a specific area of the law, either associate with counsel who is knowledgeable in the area or educate herself about the area."

The opinion makes clear that the public defender is expected to provide competent representation just like any other lawyer. "The Rules provide no exception for lawyers who represent indigent persons charged with crimes."

Responsibility of the Public Defender Supervisor

The opinion does not place all of the responsibility on the individual lawyer. The opinion also requires the public defender supervisors and managers, including the Chief, to address the ethical issue. This responsibility stems from Rule 5.1 of the Model Rules which states that lawyer supervisors are responsible for ensuring conformity with ethical rules. "Lawyer supervisors, including heads of public defenders' offices and those within such offices having intermediate managerial responsibilities, must make reasonable efforts to ensure that the other lawyers in the office conform to the Rules of Professional Conduct. To that end, lawyer supervisors must, working closely with the lawyers they supervise, monitor the workload of the supervised lawyers to ensure that the workloads do not exceed a level that may be competently handled by the individual lawyers."

Where the supervisor finds that a caseload of an individual lawyer is excessive, the opinion suggests several alternatives. The supervisor may transfer duties from the individual lawyer to other lawyers in the office, including cases and nonrepresentational duties. The supervisor also may join in the efforts of the lawyer to withdraw from cases. The supervisor may also find other resources to help solve the problem. Clearly the supervisor of a lawyer found to have an excessive caseload needs to stop assigning new cases.

American Council of Chief Defenders Ethics Opinion 03-01 (2003) states that a "chief executive of an agency providing public defense services is ethically prohibited from accepting a number of cases which exceeds the capacity of the agency's attorneys to provide competent, quality representation in every case...When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency's attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases."

Continued on page 6

Responsibility of the Delivery System

The opinion states that a “lawyer’s workload ‘must be controlled so that each matter may be handled competently.’” Whose responsibility is it to “control workload?” In private practice, it is the responsibility of the individual lawyer or the firm for which she works. That responsibility becomes more ambiguous in the context of a public defender system. While the opinion clearly places the responsibility for controlling workload on the individual lawyer representing the individual client, it does not let the system itself off the hook. It cites with approval the *ABA Ten Principles* (2002). Principle #5 of those principles requires defense counsel’s workload to be controlled “to permit the rendering of quality representation.” Compliance with these principles is a responsibility of whatever system is in place, whether it be city, county, or state. In Kentucky, because Chapter 31 creates a statewide public defender system, the responsibility is squarely on the Commonwealth.

How is an Excessive Caseload or Workload Determined?

Reference to national standards is the starting point. The national standards referred to are those of the National Advisory Commission (NAC) which mandate no more than 150 felonies, 200 juvenile cases, 400 misdemeanor cases, or 25 appeals. The American Council of Chief Defenders has reaffirmed the applicability of the NAC standards.

The determination of an excessive caseload does not begin and end with reference to the national standards. “Such a determination depends not only on the number of cases, but also on such factors as case complexity, the availability of support services, the lawyer’s experience and ability, and the lawyer’s nonrepresentational duties.”

The determination requires the individual lawyer to assess his caseload, followed by an evaluation of the lawyer’s caseload by the supervisor. This requires a sophisticated assessment of the lawyer’s numerical caseload, his or her experience, local circumstances such as the practices of the

prosecutor and judge, required travel, the speed with which the court docket moves, and all of the other factors that influence workload.

What Happens When Caseloads are Excessive?

It is clear that if public defenders malpractice cases due to having too many cases, this opinion has been violated and the potential of bar association sanctions exists. Bar sanctions can also be imposed upon public defender supervisors on up the chain to the Chief of the public defender organization.

So what happens when the lawyers in the public defender system decide that the ethical bounds have been reached? The opinion notes that individual public defenders often are limited in their ability to control their caseloads. “Measures have been adopted in some jurisdictions in attempts to control workloads, including the establishment of procedures for assigning cases to lawyers outside public defenders’ offices when the cases could not properly be directed to a public defender, either because of a conflict of interest or for other reasons.” There are several states where a chief defender can “declare unavailable” due to excessive caseloads. In other states, statutory caseload limits have been established, and once those limits have been reached, cases must be reassigned outside the public defender system. In those instances, the states have provided a funding mechanism to fund the reassignments to other lawyers.

Kentucky has no such system of “declaring unavailable.” Nor is there a statutory caseload limit that mandates a cutoff of accepting new cases. DPA has experienced chronically excessive caseloads. For the past ten years, DPA has brought a budget request to the General Assembly in an effort to reduce caseloads. DPA will be bringing a budget request again that would keep public defender caseloads below 400 new cases per lawyer per year. Only by providing funding sufficient to reduce caseloads can the other less palatable alternatives be avoided. ■

**Our willingness to assure the least among us the
guiding hand of counsel is a test of American faith.**

—Anthony Lewis

OVERWHELMED: CASELOADS OF PUBLIC DEFENDERS ARE LIMITING ACCESS TO JUSTICE

Editorial, The Independent, Ashland, Ky.

For those who care about justice in Kentucky, a new report by the Department of Public Advocacy should not be ignored. It simply says that the extremely heavy caseloads of Kentucky's public defenders is jeopardizing the access to justice for their indigent clients.

The numbers alone point to the report's accuracy. The average public defender in Kentucky is assigned 436 cases per year. Simply put, with so immense a caseload, it is humanly impossible for even the most dedicated public defenders to devote the time each of their clients deserve to be effectively represented in court. With so many clients, it is doubtful that the public defenders can even remember the names of all the people they have represented in court.

A 2004 report by the Public Advocacy Commission reported that the caseload of public defenders in Kentucky was increasing at 12 percent a year and was nearly double the average recommended in national standards. The 2005 General Assembly increased funding for the Department of Public Advocacy by \$1.8 million, allowing it to employ 16 more attorneys. However, the number of cases assigned to public defenders has increased by just over 131,000 in fiscal year 2004 to more than 148,000 this year.

A part of the problem is the inability of the state to attract and keep public defenders. With a starting salary of just over \$39,000 a year and a top pay of \$51,000 annually, attorneys find they can earn far more in the private sector than they can as public defenders. In fact, some public defenders claim they barely earn enough to repay their student loans.

A bill considered by the 2007 General Assembly attempted to address the problem. It would have forgiven at least a portion of the student debt owed by young attorneys who serve in the public sector for a specified period of time. Unfortunately, because of the opposition of a few legislators to rewarding lawyers — even low-paid ones — the bill never came close to being approved.

"Inadequate counsel" is a common claim of defendants who appeal their convictions. Sadly, if a public defender is juggling hundreds of other cases, that may too often be a legitimate gripe.

Simply put, with so immense a caseload, it is humanly impossible for even the most dedicated public defenders to devote the time each of their clients deserve to be effectively represented in court. With so many clients, it is doubtful that the public defenders can even remember the names of all the people they have represented in court.

The 1965 U.S. Supreme Court decision that required the courts to appoint attorneys for those criminal defendants who cannot afford one, said that any defendant "hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. ... This seems to be an obvious truth."

To be sure, many of those people who public defenders represent are guilty as charged, and instead of even attempting to look closely at the evidence in a case, the public defenders often move quickly to plea bargain a case, convincing defendants to plead guilty to some charge just to close the case.

However, just because a person may be guilty of some crime, they still deserve competent representation by an attorney who is not so overworked he cannot give this client more than few minutes of his time. In Kentucky, they are not getting it.

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Principle #5:

Defense counsel's workload is controlled to permit the rendering of quality representation.

— Ten Principles of a Public Defense Delivery System
American Bar Association



Legislative Update

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HEAVY CASELOADS **Editorial, *The State-Journal***

Ernie Lewis, who heads Kentucky's public defender system within the Department of Public Advocacy, isn't someone to exaggerate, so when he says his agency is facing a fiscal crisis, attention must be paid.

"I'm looking at a difficult time getting through this fiscal year," Lewis told the Associated Press. The fiscal year isn't three months old.

His comments came after the agency's annual audit was released Friday. The audit shows too few attorneys with too many cases involving poor defendants who cannot afford an attorney in court cases that range from the most serious to routine.

Each public defender in Kentucky carries an average caseload of 436 cases, and they range from a high of 651 cases per attorney in Lexington to a low of 341 for each of the five public defenders located in Glasgow. In Louisville, 62 defenders handled 33,400 cases last year, or 539 cases for each of them.

In the past seven years, caseloads have increased 50 percent.

Lewis estimates one of his defenders who opens 436 cases per year, the state average, has about four hours to work on an individual case, enough time for many cases, woefully inadequate for more serious cases.

Right now there are 60 vacancies for jobs that don't pay well and require a lot of overtime work. In facing the fiscal crisis, Lewis has frozen hiring and paid bills late to save money. That's certainly no way to solve the caseload or the budgetary problems.

There is something seriously out of sync when Kentucky's judicial system can afford \$30 million new courthouses here, there and seemingly everywhere, but it cannot afford to hire enough public defenders to serve clients adequately in those bright new courthouses.

And it is only a matter of time before a guilty verdict is overturned on appeal because of inadequate defense from an overworked and underpaid public defender carrying a caseload above the state average that itself is too high.

The two candidates for governor should address Ernie Lewis' crisis and spell out how they plan to resolve it in the next state budget.

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